

M.S. McAuliffe



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Price Waterhouse

File: B-237920.2

Date: June 26, 1990

Paul E. Lohneis, for the protester.
Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver &
Jacobson, for Urbach, Kahn & Werlin, P.C., an interested
party.
Michael E. Wyant, Federal Prison Industries, Inc.,
Department of Justice, for the agency.
Susan K. McAuliffe, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

An agency's defense of its evaluation of proposals and its award selection decision at a debriefing held in response to an agency-level protest alleging that the agency's evaluation had been improper constitutes initial adverse agency action on the protest such that any subsequent protest to the General Accounting Office must be filed within 10 working days of the debriefing.

DECISION

Price Waterhouse protests the award of a contract to Urbach, Kahn & Werlin, P.C. (UKW), for auditing services, under request for proposals (RFP) No. 1PI-0035-9, issued by Federal Prison Industries, Inc. (FPI), Department of Justice. We dismiss the protest as untimely.

The RFP was issued on August 21, 1989, and contemplated the award of a firm, fixed-price requirements contract to audit financial statements and perform field audits regarding various prison manufacturing projects. Ninety percent of the RFP's evaluation factors for award were technical factors, with the remaining ten percent relating to price. Price Waterhouse was initially awarded a contract under the RFP on November 20, at its proposed price of \$304,200. UKW filed a protest with our Office challenging the evaluation. Having discovered a flaw in the initial evaluation of proposals, FPI notified all offerors on December 26 that the proposals would be reevaluated by a new technical evaluation

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panel. UKW thereupon withdrew its protest. Subsequently, FPI terminated the Price Waterhouse contract for the convenience of the government. By letter of February 1, 1990, FPI notified the protester that since five of the six offerors were found technically equivalent upon reevaluation, price became the deciding evaluation factor and award of the contract would be made to the lowest responsible offeror, UKW, at its proposed price of \$174,270.

On February 5, Price Waterhouse filed a written protest with FPI against the termination for convenience of its contract and the proposed award of the contract to UKW. In its agency-level protest, Price Waterhouse challenged the agency's reevaluation of the proposals and claimed that the agency's cost comparison of the offers was flawed. The firm also requested a debriefing to discuss the reevaluation of proposals and to "formalize the particulars of [its] protest." On February 14, FPI provided Price Waterhouse with a debriefing at which the protester was again informed that FPI's technical reevaluation team had concluded that five of the six offers were technically equivalent and that the intended award would be based on price. The agency gave no indication that it would take any further action in response to Price Waterhouse's protest or that it would reconsider the proposed award to UKW. FPI awarded the contract to UKW on March 1.

On March 5, Price Waterhouse filed its protest with our Office challenging the agency's actions. The protest specifically reiterates the firm's agency-level protest against the termination of its contract and the cost comparison of proposals. Price Waterhouse also alleges that the selection decision, based upon the reevaluation team's finding of technical equivalency among five proposals, was inconsistent with the solicitation's evaluation scheme, which placed primary emphasis on the offeror's technical ability to satisfy contract requirements. The protester contends that it should have received additional evaluation credit, which would have set its proposal ahead of the others, based upon its technical ability and full understanding of the contract requirements due to its experience as the incumbent of these services. The agency argues that the protest is untimely. We agree.

Our Bid Protest Regulations, 4 C.F.R. part 21 (1990), provide that protests, other than those based on alleged solicitation improprieties, must be filed with either the contracting agency or this Office within 10 working days of when the basis for the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). If a protest has been filed

initially with the contracting agency, any subsequent protest to this Office must be filed within 10 working days of the protester's actual or constructive knowledge of initial adverse agency action on the agency-level protest. 4 C.F.R. § 21.2(a)(3). Initial adverse agency action is the first action, or inaction, by an agency that is prejudicial to the position taken in a protest at that level. See LinCom Corp.--Request for Reconsideration, B-231806.2, Aug. 10, 1988, 88-2 CPD ¶ 130. Initial adverse agency action may consist of the agency's defense and reaffirmation of its evaluation at a debriefing conference. See J.A. Jones Construction Co., B-227296, Sept. 1, 1987, 87-2 CPD ¶ 215.

In this case, Price Waterhouse filed its protest with the agency immediately after learning that, based upon the results of the reevaluation, it had not been selected for award and that award would be made to UKW. The firm claimed that its contract had been wrongfully terminated and that the agency's reevaluation of the proposals was improper. In response to the protest, the agency debriefed Price Waterhouse to explain and defend its evaluation and selection results. Price Waterhouse subsequently filed its protest with our Office on March 5, more than 10 working days after the debriefing, again alleging that the termination of its contract and the reevaluation of proposals were improper.^{1/}

In our view, Price Waterhouse was on notice as a result of the debriefing that, contrary to what Price Waterhouse asserted in its agency-level protest, the agency believed that its evaluation and proposed award to UKW were proper. Accordingly, we find that Price Waterhouse's protest to our Office clearly is untimely under 4 C.F.R. § 21.2 (a)(3), since the agency's defense of its actions at the debriefing constituted initial adverse agency action following Price Waterhouse's protest to FPI. See LinCom Corp.--Request for Reconsideration, B-231806.2, supra. As such, any subsequent protest to our Office should have been filed by Price Waterhouse within 10 working days of the February 14 debriefing. 4 C.F.R. § 21.2(a)(3). Further, to the extent the protester asserts it did not learn all of its bases of protest until the February 14 debriefing, such protest allegations (e.g., regarding whether the instructions given to the reevaluation team were improper) are also untimely

^{1/} We note that Price Waterhouse did not receive any new information from the agency concerning its grounds for protest subsequent to the debriefing and prior to its protest filed with our Office.

since they were not filed within 10 working days of when the protest bases were known. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed.

Ronald Berger

Ronald Berger
Associate General Counsel